FILE COPY

FILED

JAN 31 19[illegible]

MICHAEL [illegible]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-630

PAUL HALL, individually and as President or AL KERR, as Secretary Treasurer, or EARL SHEPARD, as Vice President, or CAL TANNER, as Executive Vice President of the Seafarers International Union of North America—Atlantic, Gulf, Lakes and Inland Waters District,

Petitioners,

v.

JOHN COLE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

HOWARD SCHULMAN
Attorney for Petitioners
1250 Broadway
New York, New York 10001

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	4
Summary of Argument	7
Argument	10
I. The Act's legislative history and its Section 102 demonstrates that Congress did not authorize the award of counsel fees in a member's successful Section 102 suit against his union for violation of his Section 101(a) rights. Nor may the courts, absent such statutory authority, create Judge exceptions to award counsel fees	10
A. Legislative history	10
B. The Union structure and status	18
C. Courts of Appeals and other authorities are in conflict as to Section 102 authority to award counsel fees	21
1. Opinions and decisions determining no authority to award counsel fees in successful Section 102 actions	21
2. Opinions and decisions determining authority to award counsel fees in successful Section 102 actions	24
D. The Fleischmann and Mills holdings	30
E. Conclusion	32

PAGE

II. Counsel fees are not awardable in suits against unions under Section 102 for violation of members Section 101(a) rights where the union acts in good faith or without malice. Nor are such fees awardable unless the suing member is found to have acted in good faith 33

A. Legislative and judicial concern in fashioning monetary awards against unions .. 33

B. The standards applied by Courts of Appeals in determining when counsel fee awards are proper, are in conflict 37

Conclusion 39

Authorities Cited

CASES

Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, etc., v. Lockridge, 403 U.S. 274 .....35, 36, 39

Arcambel v. Wiseman, 311 Dall. 1 L. Ed. 613 30

Bailey v. Netter, E.D. La. (1967), 266 F. Supp. 165 24

Burch v. International Assn. of Machinists, 454 F.2d 1170 (5 Cir. 1972) 28, 38, 39

Cefalo v. International Union of District 50, United Mine Workers of America (1970), 311 F. Supp. 946 30

Cole v. Hall, E.D.N.Y. (1964), 35 FRD 4 23

Gartner v. Soloner, 384 F.2d 348 (3 Cir. 1967), cert. den. 390 U.S. 1040 .....6, 16, 22, 23, 24, 25, 26, 27, 28, 29, 30, 38

PAGE

Hodgson v. Local 6799 United Steelworkers of America, 403 U.S. 333 .....20, 29, 35

Humphrey v. Moore, 375 U.S. 335 .....35, 36, 39

International Brotherhood of Boilermakers v. Hardeman, 401 U.S. 233 .....19, 25, 36

Jacques v. Local 1418 International Longshoremen's Association, E.D. La. (1965), 246 F. Supp. 857 .. 24

Johnson v. Nelson, 325 F.2d 648 (8 Cir. 1963) 26

Kerr v. Screen Extras Guild, Inc., 466 F.2d 1267 (9 Cir. 1972) 23, 28, 38

Leonard v. M.I.T. Employees' Union, D. Mass. (1964), 225 F. Supp. 937 24

Linn v. United Plant Guard Workers, 383 U.S. 53. 8, 9, 32, 34, 36, 39

Local 2 International Bro. of Telephone Workers v. International Bro. of Telephone Workers, C.D. Mass. (1969), 295 F. Supp. 1178, aff'd on a different issue (1 Cir. 1969), 461 F. 2d 414 30

Magelseen v. Local Union 518, Operative Plasterers, W.D. Mo. (1965), 240 F. Supp. 259 24

McCraw v. United Association of Journeymen, etc., 341 F. 2d 705 (6 Cir. 1965) 21, 22, 24, 28

Mills v. Electric Auto-Lite Company, 396 U.S. 375. 6, 8, 31, 32, 33

National Woodwork Manufacturing Ass'n. v. N.L.R.B., 386 U.S. 612 ..... 11, 25

NLRB v. Allis-Chalmers Manufacturing Co., 388 U.S. 175 .....9, 18, 35, 36, 37, 38

Polin v. Kaplan, 257 N.Y. 277; 177 N.E. 833 19

Republic Steel Corp. v. NLRB, 311 U.S. 7 13

PAGE

Robins v. Schonfeld, S.D.N.Y. (1971), 326 F. Supp. 525 30

Salzhandler v. Caputo, 316 F. 2d 445 (2 Cir. 1963), cert. den. 373 U.S. 943 21

Sands v. Abelli, S.D.N.Y. (1968), 290 F. Supp. 677 .. 30

Sertic v Cuyahoga, Lake etc., Carpenters District Council, 459 F. 2d 579 (6 Cir. 1972) 22, 28

Sprague v. Ticonic National Bank, 307 U.S. 161 22

Teamsters Local 20 v. Morton, 377 U.S. 252 ....8, 32, 36, 37

The Fleischmann Distilling Corporation v. Maier Brewing Co., 386 U.S. 714 .....7, 8, 10, 16, 17, 22, 23, 26, 27, 28, 29, 30, 31, 32

Vaca v. Sipes, 386 U.S. 171 .....8, 9, 32, 34, 35, 36, 39

Vars v. International Bro. of Boilermakers, etc., D. Conn. 1963, 215 F. Supp 943, aff'd. on a different issue (2 Cir. 1963), 320 F. 2d. 576 23

White v. King, E.D. La. (1970), 319 F. Supp. 122 ... 30

Yablonski v. United Mine Workers, D.D.C. (1970), 314 F. Supp. 616, reversed on different issue (D.C. Cir. 1972), 459 F. 2d 1201 ..... 24, 32

STATUTES

Labor-Management Reporting and Disclosure Act (73 Stat. 523, 29 U.S.C. § 411, et seq.):

Section 101(a)(2) 3, 5, 21, 22, 37

Section 101(a)(5) 25

Section 102 .....3, 5, 7, 8, 10, 11, 21, 22, 23, 24, 25, 26, 27, 32, 33, 37, 38, 39, 40

Section 201(a)(5)(I) 9, 19, 36

PAGE

Section 201(c) 7, 10, 13, 17, 20, 29

Section 401(c) 29

Section 501(b) 7, 10, 13, 17, 21, 26, 29, 32

Section 609 .....4, 5, 24, 27

OTHER RELEVANT STATUTES

Labor-Management Relations Act (61 Stat. 136, 29 U.S.C. Sec. 141, et seq.):

Section 7 13

Section 8(a)(3) 13

Section 8(b)(1) 35

Section 8(b)(2) 35

Section 10(c) 13, 35

Section 303 37

LEGISLATIVE HISTORY

Reports:

Sen. Rep. No. 187, 86th Cong. 1st Sess., 5, (1959), U.S. Code Cong. & Admin. News, p. 2322 .....7, 10, 18, 19, 20, 35

House Minority Rep. No. 741, 86th Cong. 1st Sess. (1959), U.S. Code Cong. & Admin. News 1959, p. 2424 .....14, 23, 24

Debates:

105 Cong. Rec. 5810 (daily ed.); II NLRB Leg. Hist. 1102 15

105 Cong. Rec. 5819-22 (daily ed.); II NLRB Leg. Hist. 1111-1114 15

PAGE

105 Cong. Rec. 5998 (daily ed.); II NLRB Leg. Hist. 1221 16

105 Cong. Rec. 9108-9109 (daily ed.); II NLRB Leg. Hist. 1280-81 ..... 14, 21, 22, 23, 24, 25

105 Cong. Rec. 13,088 (daily ed.); II NLRB Leg. Hist. 1519 ..... 11, 25

105 Cong. Rec. 13,091 (daily ed.); II NLRB Leg. Hist. 1522 ..... 12, 25

105 Cong. Rec. 14,357 (daily ed.); II NLRB Leg. Hist. 1633 25

GOVERNMENTAL STUDIES

Union Financial Statistics 1963-1966:

U.S. Department of Labor, Labor Management Services Administration, February 1969 .... 19, 20

Union Financial Statistics 1960-1970:

U.S. Department of Labor, Labor Management Services Administration, October, 1972 20

MISCELLANEOUS

Prof. Smythe, Assistants Schwab and Madigan, University of Minnesota; Individuals' Procedural Rights in Union Disciplinary Acts; CCH, Labor Law Journal, April, 1967, p. 266 18

Prof. Thomas G. S. Christensen, NYU Law School; Union Discipline Under Federal Law: Institutional Dilemmas in an Industrial Democracy. NYU Law Review, Vol. 43 No. 2, April 1968, p. 227 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-630

PAUL HALL, individually and as President or AL KERR, as Secretary Treasurer, or EARL SHEPARD, as Vice President, or CAL TANNER, as Executive Vice President of the Seafarers International Union of North America—Atlantic, Gulf, Lakes and Inland Waters District,

Petitioners,

v.

JOHN COLE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

Opinions Below

The opinion of the Court of Appeals (A. 5-C. 2a-9a) is officially reported at 462 F. 2d 777. The decision of the District Court (A. 3-C. 10a-21a)[1] is not officially reported

[1] The Single Appendix has been cited herein as "A". Such Single Appendix contains notations where referred to documents are set forth in the Appendix attached to the printed Petition for Certiorari. The reference "C" refers to the Appendix attached to said printed Petition for Certiorari and pages therein.

but is unofficially reported at 66 LC ¶ 11,953. The District Court's supplemental decision and order (A. 3-C. 22a) is not reported. The District Court's findings of fact and conclusions of law (A. 2-C. 23a-39a) is not reported. The District Court's amended findings of fact (A. 3-C. 40a-42a) is not reported. The order of the Court of Appeals denying the petition for rehearing (A. 5-C. 43a) is not reported.

Jurisdiction

The judgment of the Court of Appeals was entered on June 22, 1972. The order of the Court of Appeals, denying a petition for rehearing was entered on July 24, 1972. The petition was filed October 24, 1972, and the writ was granted December 18, 1972. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

Questions Presented

1. Whether a federal court in a Section 102 proceeding, reviewing an expulsion of a member by a union, finding his expulsion in violation of Section 101(a)(2), and directing his restoration to membership, may also award the member's attorney reasonable counsel fees.

2. Whether a federal court in a Section 102 proceeding, in restoring an expelled member to membership, may award reasonable counsel fees when it is found that the member sustained no damages by reason of the expulsion; additionally found that the union in good faith believed it had the right to discipline the member for his conduct; further found no motivation of malice by the union in its discipline of the member and does not find that the member by his conduct acted in good faith, but instead concludes the member's conduct was motivated in part for personal political ambitions.

Statutes Involved

Section 101(a)(2) of the Labor-Management Reporting and Disclosure Act (hereinafter referred to as the "Act"), 73 Stat. 523, 29 U.S.C. § 411(a)(2) provides:

> FREEDOM OF SPEECH AND ASSEMBLY.—Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided,* That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

Section 102 of the Act, 73 Stat. 523, 29 U.S.C. § 412 provides:

> Any person whose rights secured by the provisions of this title have been infringed by any violation of this title may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

Section 609 of the Act, 73 Stat. 523, 29 U.S.C. § 529 provides:

> It shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this Act. The provisions of section 102 shall be applicable in the enforcement of this section.

Statement of the Case

Cole was a member (A. 2-C. 25a) of the petitioner union (hereinafter SIU) which was an affiliate of the Seafarers International Union of North America (A. 2-C. 23a). The SIU since 1940 competed with the National Maritime Union (hereinafter NMU) for membership among unlicensed seamen (A. 2-C. 26a). In 1957 and again in 1962 the NMU attempted to take employment opportunities away from SIU members by raiding SIU's contractual rights aboard Robin Line vessels (A. 3-C. 40a, 41a). By virtue of such contractual rights, employers make contributions to funds to provide pension, welfare and vacation benefits for SIU members (A. 3-C. 40a) and loss of such Robin Line employment opportunities would reduce monies available for such benefits. The SIU in conjunction with allied organizations, undertook successful activities to repel the NMU raid (A. 3-C. 41a).

Thereafter, Cole at a union membership meeting proposed a written resolution condemning SIU's retaliatory action against the NMU and his union's jurisdictional fight with the NMU competing for contractual rights for unlicensed seamen employment opportunities—maintaining *inter alia*, that such activities infringed upon his employ-

ment (shipping) rights and contrary to his philosophical trade union concepts (A. 2-C. 28a, 32a; A. 3-C. 16a). Cole sought membership action to implement his resolution and was unanimously, except for a seconder to his resolution, rejected (A. 2-C. 33a). Subsequent thereto a SIU member, pursuant to the union constitution, filed written charges against Cole for his aforesaid action (A. 2-C. 33a, 34a). After hearing before a membership tribunal in which Cole participated, his expulsion was recommended and concurred in by the union membership and his subsequent appeal was denied (A. 2-C. 34a, 35a). Cole thereafter brought an action in the District Court for an injunction, compensatory and punitive damages and counsel fees (A. 3-C. 10a), asserting such claims under the Act's Sections 101(a)(2), 102 and 609. A preliminary injunction was granted and thereafter affirmed by the Court of Appeals.

After plenary trial of the action, the District Court found, that it may be as the SIU contended that Cole's aforesaid activities would result in a decrease in the number of union jobs available for the union members and would reduce both the union membership and its treasury, nevertheless, Cole's activities were protected under the Act's Section 101(a)(2) and that the proviso in such Section was inapplicable, as the same was not intended to discourage Cole's activities merely because the ultimate result would not benefit the SIU (A. 3-C. 16a).

The District Court however, found that Cole suffered no loss of damages as a result of his expulsion. On the contrary it was found, that Cole's right to employment as well as insurance and welfare benefit rights, remained unimpaired (A. 3-C. 18a), and that prior to the District Court trial, Cole, since 1967, was retired and currently receiving a union pension (A. 2-C. 37a). The District Court further found that Cole failed to prove any other item of compensatory damage such as alleged injury to reputation and accompanying emotional strain (A. 3-C.

18a). The District Court, in rejecting Cole's claim for punitive damages, specifically found that all the defendants in good faith, believed they had a right to charge and discipline Cole for his aforesaid activities, concluding that there was an absence of showing of malice by any of the defendants (A. 3-C. 19a; A. 2-C. 38a). The District Court did not find that Cole in his activities at bar acted in good faith. On the contrary the District Court found Cole's complaints, grievances and accusations were in part, motivated by his political ambitions for union office (A. 2-C. 38a).[2]

The District Court dismissed all of Cole's causes of action against all the individual union officer defendants. The Court, however issued a mandatory permanent injunction against the SIU, directing that Cole be reinstated to union membership but awarded no damages. The Court, however, awarded counsel fees to Cole's attorney in the sum of $5,500 (A. 4). In awarding counsel fees in this Section 102, 609 action, the District Court found authority for the same as enunciated by the majority in *Gartner* v. *Soloner,* 384 F. 2d 348 (3 Cir. 1967), cert. den. 390 U.S. 1040. The Court further concluded that it should not be denied such power to award counsel fees because of the absence of expressed statutory provisions authorizing the same, citing this Court's decision in *Mills* v. *Electric Auto-Lite Company,* 396 U.S. 375 (A. 3-C. 21a).

Petitioners appealed and respondent took no appeal or cross-appeal from the District Court's judgment. The Court of Appeals affirmed (A. 5-C. 2a-9a).

---

[2] Prior and similar complaints, grievances and accusations by Cole were found by the District Court, motivated then by his resentment that a college scholarship awarded to his daughter by an entity affiliated with the SIU was revoked, notwithstanding as the court found, such revocation was because she had failed to maintain a B average in accordance with the conditions of the grant (A. 2-C. 25a, 26a).

Summary of Argument

I.

The rule in the United States Courts has long been that attorney fees are ordinarily not recoverable in the absence of a statutory or contractual provision allowing thereof. *The Fleischmann Distilling Corporation* v. *Maier Brewing Co.*, 386 U.S. 714. The Act's comprehensive scheme of regulation of the internal affairs of labor organizations and the Congressional legislative history, demonstrate that where Congress intended to authorize counsel fee awards for violation of federally created union member rights, it so specifically stated.[3] Section 102 does not so specifically provide. Nor as the legislative history shows, ever intended. Further, such legislative history demonstrates a legislative scheme to foster democratically run unions taking into account the special problems and functions of unions, but that consistent therewith, remedies should not be provided which could undermine union self-government nor weaken them in their role as collective bargaining representatives.[4] The imposition of attorney fee awards in successful 102 actions against unions, not specifically authorized by Congress, would frustrate the aforesaid latter objective.

The Act's Section 102 constitutes a specifically Congressional created private right as distinguished from a judicial implied private right derived from a Congressional determination to consider certain activities improper and thus void, with the need to fashion relief for violation of

---

[3] The Act's Title II Section 201 (c), 29 U.S.C. 431 (c); Title V Section 501 (b), 29 U.S.C. 501 (b), *infra*.

[4] S. Rep. No. 187, 86th. Cong. 1st Sess., 5, (1959). U.S. Code Cong. & Admin. News, p. 2322, *infra*.

such implied private right, *Mills* v. *Electric Auto-Lite Company*, 396 U.S. 375. Nor present is the creation of a monetary fund or increase in value of held personal property so as to create an exception to the application of the long standing rule set forth in *Fleischmann, supra.* Nor should unions, non-profit associations of workers, in the overwhelming majority with limited income, have their monies subject to the imposition of counsel fees for violation of a fellow member's federal created right upon the concept of therapeutic value, unless such authority is expressly so stated by the legislature, a condition not present with respect to a Section 102 action.

II.

Congress and the courts have demonstrated that monetary awards against union treasuries shall be limited and drawn with great caution to assure the stability of labor unions and avoid the frustration of expressed national labor policy, *Linn* v. *United Plant Guard Workers,* 383 U.S. 53; *Vaca* v. *Sipes,* 386 U.S. 171; *Teamsters Local 20* v. *Morton,* 377 U.S. 252. Assuming arguendo Section 102 authorizes a discretionary award of counsel fees in a successful Section 102 action, nevertheless such award is not proper, unless appropriate conduct is found so as to accommodate to the Congressional and courts concern expressed in the aforesaid decisions.

An attorney's fee award in a successful Section 102 action is not proper unless the suing union member has acted in good faith. The treasury of union members should not be the source of lawyers fees absent a finding of good faith conduct of a suing member in pursuit of his rights under Title I of the Act. The Act creating a member's Title I rights, carries with it as a concomitant the requirement that the member act in good faith.

Furthermore, given the history and nature of a union, an association of workers, promulgating their rules of order and society by adopting a constitution and by-laws mandated by the Act's Section 201(a),[5] with provisions for regulating the conduct of members and the self government administration thereof, an award of counsel fees in a successful Section 102 action is not proper, unless it is found that the union acted arbitrarily, capriciously or maliciously in disciplining the member, *Linn, supra, NLRB* v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, 195. An attorney's fee award under such circumstances would contravene Congress' concern, "not to undermine union self government", *Allis-Chalmers, id.* 194. For exposure to attorney fee awards by reason of negligent or erroneous but good faith disciplinary proceedings would discourage self union government regulation. Equally, such result would be totally at variance with this Court's holding in analagous treatment of members' and unions' rights and obligations, that good faith union conduct precludes the award of monetary damages to a member and his attorney against the member's union. *Vaca, supra.*

---

[5] Section 201(a): Every labor organization shall adopt a constitution and by-laws and shall file a copy thereof with the secretary, together with a report signed by its president and secretary or corresponding principal officers, containing the following information—
* * *

(5) (I) imposition of fines, suspensions, and expulsions of members, including the grounds for such action and any provision made for notice, hearing, judgment on the evidence, and appeal procedures.

ARGUMENT

I.

The Act's legislative history and it's Section 102 demonstrates that Congress did not authorize the award of counsel fees in a member's successful Section 102 suit against his union for violation of his Section 101(a) rights. Nor may the courts, absent such statutory authority, create Judge exceptions to award counsel fees.

As this Court has held, in the absence of a statute or enforceable contract so providing, the American rule as distinguished from the English rule, is that attorney fees are not ordinarily recoverable by successful litigants, *Fleischmann, supra.* Section 102 as distinguished from other remedial Sections of the Act, to wit, Sections 201(c) and 501(b) cited and discussed *infra,* does not provide for or authorize the award of attorney fees to successful litigants. There is an absence of statutory authority.

A. Legislative History.

The Act represents a comprehensive Congressional scheme, most intricate and complex, regulating an extensive range of internal union affairs. It began its course in the 86th Congress in March, 1959 as S. 1555[6] and was finally enacted in September, 1959. The debate and discussion was most extensive as witness two volumes Leg. Hist. Its six Titles provide for comprehensive multiple federal rights, obligations and remedies, primarily for union mem-

[6] S. Rep. No. 187, 86th Cong. 1st Sess., NLRB Legislative History of the Labor Management Reporting and Disclosure Act of 1959, Volume I, p. 397 (1959). (This two volume publication is hereinafter referred to as "Leg. Hist.")

bers and their unions with the fashioning of a detailed scheme regulating specific conduct and providing specific remedies. Such elaborate legislative scheme makes clear, as hereafter demonstrated, that where Congress determined to provide authority for the award of and recovery of counsel fees, it had no hesitation in so expressly stating. Similar expressions however, were not made by Congress, relative to authority to award counsel fees in Section 102 actions. In fact as discussed hereafter, the absence of such authority was specifically called to the Houses' attention during its deliberations, but notwithstanding the same, Congress failed to authorize such awards.

The legislative history, although relatively sparse on the issue of "relief (including injunctions) as may be appropriate" under Section 102, nevertheless, such history as is available demonstrates Congressional intent not to authorize attorney's fees under Section 102 provisions.

In the judicial search of legislative history, in the endeavor to gleam or determine the legislative intent, the primary weight should always be given to the views expressed by the sponsors of the bill. *National Woodwork Manufacturing Ass'n.* v. *N.L.R.B.* 386 U.S. 612. It is unquestioned that the prime sponsors of the Act in the House, were Congressmen Landrum and Griffin. Congressman Griffin, in referring to the Act's Section 609, which provides that Section 102's remedies shall be applicable—incorporates them, stated:

> "(c) Section 607 of the Senate-passed bill which provided criminal enforcement of rights guaranteed under the Act was stricken by the House committee. The substitute—in sections 609 and 610—restores the sense of the Senate provision but makes it clear that criminal sanctions apply only when rights are denied through the use of force or violence."[7]

[7] 105 Cong. Rec. 13088 [daily ed.]; II Leg. Hist. 1519.

Thereafter Congressman Griffin in the Congressional debate, turning to a detailed analysis of the Act, stated:

> "Section 609 (denial of rights through discipline): The Senate-passed bill (S. 1555) contained a criminal enforcement provision (sec. 607) which was stricken out by the House committee. (Paragraph (a) of that section 607 would have made it a crime for any labor organization, or its agents, to fine, suspend, expel, or otherwise discipline a member for exercising rights guaranteed by the act). The substitute bill provides that denial of such rights through union discipline shall be unlawful; however, unlike S. 1555, the substitute provides for civil, rather than criminal, enforcement. In our judgment, the conduct prohibited by this section is generally comparable to conduct described as an unfair labor practice under the Taft-Hartley Act and, accordingly, we do not believe that criminal sanctions are warranted." [8]

The conduct which the Act's sponsors prohibited was in their judgment comparable to unfair labor practices under the Taft-Hartley Act (29 USC Sec. 141 *et seq.*). By tracking the Act's prohibited conduct (other than those specifically made criminal) with unfair labor practices, by equating both, the Act's sponsors were setting forth the Congressional scheme as to the prohibited conduct and the comparable appropriate remedies. Certainly there cannot be imputed to the Act's sponsors an ignorance of the remedial provisions contained in the Taft-Hartley Act. Equally, in the light of the comparable conduct sought to be prohibited, unfair labor practices and rights of members established by the Act, there should not be found, absent expressed language to the contrary, a Congressional intent to prescribe substantially different remedies. On the contrary, the converse would be impelled—the same remedies. Taft-Hartley's remedial provisions provides that the NLRB:

---

[8] 105 Cong. Rec. 13091 [daily ed.]; II Leg. Hist. 1522.

> "* * * shall issue an order requiring such person to cease and desist from such unfair labor practice, and to take affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act:" (Section 10(c)).

Such NLRB remedy encompasses injunctive relief as well as monetary damages to the employee to the extent of his lost wages and does not permit of other monetary remedies. *Republic Steel Corp.* v. *NLRB,* 311 U.S. 7 (1940). Conduct comparable to unfair labor practices which the Act's sponsors sought to prohibit, implicity carries with it the Congressional intent to apply comparable remedies absent expressed language to the contrary such as in Sections 201(c) and 501(b) of the Act, *infra.* And discipline by a union of a member, allegedly in violation of the exercise of Section 101(a)(2) rights of expression and conduct in support thereof is most comparable, if not the counterpart of employer discipline of an employee for exercise of his Section 7 rights provided in the Taft-Hartley Act and an unfair labor practice under Section 8(a)(3) of that Act.

The foregoing Congressional intent to apply comparable remedies to comparable conduct which Congress sought to prohibit, becomes most manifest when further examination is made of Congressional remarks.

Senator Goldwater, an advocate of a bill more stringent than that eventually passed and now constituting the Act, directed his remarks as to what he considered weaknesses in the Act. Zeroing in on the remedy provided for violation of a member's rights guaranteed by Title I of the Act, he stated:

> "Although the bill permits the union member himself to sue for infringement of his rights, the nature of the suit is such as to promise, even if successful, little in the way of monetary damages except in the rare case where the plaintiff's job rights or job tenure have been adversely affected. Moreover, the bill does not grant him, even where successful in his suit, reasonable counsel fees or other

> costs. It thus forces him to assume the entire financial burden of the litigation. For an ordinary rank-and-file union member who is generally a wage worker, such a litigation thus becomes an impossible financial burden. In recognition of these difficulties, the Fair Labor Standards Act, for example, requiring the payment of minimum wages and premium overtime pay for certain categories of workers, permits not only the worker himself to bring a suit for non payment (which he may do in the State as well as the Federal courts) and to recover attorney's fees and court costs if successful, but if the worker prefers, he may have the Secretary of Labor bring such suit in his behalf.[9]

Similar to Senator Goldwater's remarks is the House Minority Report on the Act, H.R. Rep. No. 741, 86th Cong. 1st Sess. (1959), U. S. Code Cong. & Ad. News 1959, p. 2424:

> "One of the most serious inadequacies of the Senate bill is the lack of any effective enforcement procedure to protect union members from those few union officials who fail to recognize that a union belongs to its members. Under the bill the individual member must shoulder the burden of litigation costs himself. The union officer (sic), on the other hand, have the entire resources of the union at their disposal. This impractical enforcement method is weakened still further in the committee bill."

The Act at bar originated with the reporting of the Kennedy-Ervin Bill to the Senate by the Committee on Labor and Public Welfare, in April, 1959, *supra*. Such bill however, did not contain provisions, euphemistically thereafter characterized as bill of rights. A few days thereafter Senator McClellan proposed an amendment to the Kennedy-Ervin bill, which provided for members' bill of

---

[9]Analysis of S-1555 passed by the Senate, in his testimony before the House Committee On Education and Labor deliberating the Bill, June 8, 1959. 105 Cong. Rec. 9109 [daily ed.]; II Leg. Hist. 1281.

rights. The enforcement Section of such amendment provided:

> "Sec. 102. Any officer or agent of any such labor organization who, through use or abuse of authority, or through failure to discharge the duties of his office, or otherwise, willfully interferes with or prevents, or attempts to interfere with or prevent, the exercise by any member of a right to which such member is entitled under the provisions of section 101 shall be fined not more than $10,000 or imprisoned for not more than two years, or both.
>
> Sec. 103. The Secretary, whenever it shall appear that any person has violated or is about to violate any of the provisions of this title, may bring an action in a district court or other court of the United States for such relief as may be appropriate including, but without limitation, injunctions to restrain any such violations and to compel compliance with this title. Any such action against a labor organization may be brought in the United States District Court for the District of Columbia or in the district court or other court of the United States where the violation occurred or is about to occur." [10]

It is most significant to note that Section 103 of the McClellan amendment was the same language contained in the enforcement provisions provided for under Title II, Section 210 and Title III, Section 304(a).

Thereafter, serious concern was expressed as to the enforcement provisions of Section 102 in that bureaucratic chaos might result if the Secretary was required to initiate and process all complaints on behalf of union members. [11] To dispel such fears, Senator Kuchel offered an amendment removing the Secretary of Labor as the sole person to seek relief in federal courts and instead gave that right directly

---

[10] 105 Cong. Rec. 5810, [daily ed]; II Leg. Hist. 1102.

[11] Id, at 5819-5822; Id. at 1111-1114.

to the aggrieved union member. The Kuchel amendment became the version ultimately adopted by the Senate, and states:

> "Any person whose rights secured by the provisions of this title have been infringed may bring an action in a district court of the United States for such relief as may be appropriate. Any such action against a labor organization shall be brought in the United States district court for the district where the alleged violation occurred, or where the headquarters of such labor organization is located." [12]

The only substantial alteration of the Kuchel amendment was the subsequent parenthetical insertion of the words "including injunctions", to insure that at least an injunction would be considered appropriate relief under the Act. *Gartner* v. *Soloner, supra,* at p. 350.

It is most apparent from the foregoing that at no time did Congress intend reasonable counsel fee awards to be authorized pursuant to Section 102. The legislative history aforesaid contains no authority for any conclusion which would authorize the award of attorney fees. It is further clear that only the Secretary of Labor was contemplated to be the sole authority authorized to enforce the provisions and certainly it cannot be maintained or inferred that Congress intended the Secretary to be awarded attorney fees, for, as noted, the Kuchel amendment was solely to remove the fears of bureaucratic chaos and nothing else. When Congress intends to allow recovery of attorney fees in statutory actions, it has no difficulty in so expressly stating, as witness, *Fleischmann, supra,* at 721, fn. 17.

The foregoing concept is equally present in the Act at bar. For when Congress determined in the Act to authorize reasonable attorney fees, it so specifically

---

[12] 105 Cong. Rec. 5998 [daily ed]; II Leg. Hist. 1221.

stated, as in the Act's Section 201(c) and 501(b).[13] To imply a Congressional intent that the federal courts may award attorney fees in Section 102 actions, absent specific authority in the Act, where other Sections of the same Act contain such specific authority, *supra,* would constitute an aborting of Congressional intent, and substitute a judicial judgment for a Congressional judgment. Such conduct would expressly override accepted judicial doctrine utilized for finding the manifestations of Congressional intent, set forth so clearly in *Fleischmann* at 721, fn. 17, *supra.*

---

[13] Sec. 201(c) Every labor organization required to submit a report under this title shall make available the information required to be contained in such report to all of its members, and every such labor organization and its officers shall be under a duty enforceable at the suit of any member of such organization in any State court of competent jurisdiction or in the district court of the United States for the district in which such labor organization maintains its principal office, to permit such member for just cause to examine any books, records, and accounts necessary to verify such report. The court in such action may, in its discretion, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

Sec. 501(b) When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

B. The Union Structure and Status.

Manifestly, Congress was not ignorant at the time of its deliberations leading to the Act's adoption, of the structure and status of unions—their constituencies and functions and the further fact that the overwhelming majority were honestly and democratically run, with the revealed abuses confined to but a few unions. In fact, Congress so concluded, Sen. Rep. No. 187, 86th Cong. 1st Sess., 5 (1959), U.S. Code Cong. & Admin. News p. 2322.

Historically, unions constitute an association of workers, banded together for their economic and social betterment. They adopt their own constitutions and by-laws to govern the conduct of their members which includes the union's right to discipline a member for violations of such self adopted laws. The right to discipline is critical to the union and its members, for unions constantly face threat of loss of members and employment opportunities to other unions or to non union status. It is imperative, that unions maintain the contractual obligations with their members employers, and stability for the union as an institution. To secure and protect their membership and institutional interests as aforesaid, it is necessary as in any healthy society, to discipline the breaker of the rules. Absent such disciplinary authority, the union's very viability is most seriously threatened with the most adverse consequences to its members, as history has conclusively demonstrated,[14] see *N.L.R.B.* v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, 181, 182.

Government statistics further conclusively demonstrate that the overwhelming majority of unions are most modest

[14] See: Prof. Smythe, Assistants Schwab and Madigan, University of Minnesota; Individuals' Procedural Rights in Union Disciplinary Acts; CCH, Labor Law Journal, April 1967 at 266.

in numbers and financial resources, each undertaking within the framework of their limited means, the discharge of the aforesaid functions and responsibilities as associations of working men and women. Most significant is the fact that disciplinary proceedings against members are instituted by fellow members of the union and administered by the union, pursuant to constitution and by laws, which as mandated by Section 201 (a) *supra,* they are required to adopt, and which include provisions for the initiation and holding of such disciplinary proceedings. Nor may the union, eschew a member's filing of a charge against another member and the hearing and determination of such charge, without abridging its constitution or by laws and being liable therefor. For such constitutions and by laws historically constitute contractual obligations by and among the union, its members and officers. *Polin* v. *Kaplan,* 257 N.Y. 277; 177 N.E. 833. Equally significant is that unions and particularly local unions, because of their limited financial resources are not in a position to, nor do they generally undertake the elaborate and costly process so familiar in public judicial proceedings—such as expensive official transcriptions of hearing proceedings.[15] For as expressed *supra,* the constituency is generally small, its proceedings conducted by working members in a general and reasonable informal manner.[16] Certainly the Act was not intended to weaken their viability with a yoke of expensive if not prohibitive trappings, Sen. Rep. No. 187, *supra.*

As demonstrated by U. S. Department of Labor studies for the years 1963-1966, there were less than 51,000 unions in the United States of which no less than 48,000, or 94% were local labor organizations, the remainder being a overwhelming majority of intermediate bodies and the balance

[15] *International Brotherhood of Boilermakers* v. *Hardeman,* 401 U.S. 233, fn. 15.

[16] *Id.*

national or international unions.[17] Further U. S. Department of Labor studies demonstrate that in 1960 approximately 84% of such 94% of total unions, had receipts of less than $25,000 per annum.[18] The foregoing facts as to the financial conditions of unions in 1960 and which obviously did not vary to any appreciable degree from 1959, was the status during Congress' deliberations of the Act.

Sen. Rep. No. 187 *supra,* which this Court has found summarizes Congress' general objectives of the Act,[19] states, "A strong independent labor movement is a vital part of American institutions*** (and), (T)he Senate should be careful neither to undermine self government within the labor movement nor to weaken unions in their role as bargaining representatives of employees". With 94% of the American labor movement constituency located in local unions and 84% of such local unions receiving receipts of less than $25,000 per annum to administer the totality of their members and institutional interests, and such institutions not their affiliated nationals or internationals, being required by custom, practice and law to process and determine disciplinary proceedings initiated by their members, it is most readily discernible therefrom, that Congress consistent with its aforesaid general objectives, never intended to subject the most limited financial resources of local labor organizations to imposition of attorney fee awards for improper disciplined members. On the contrary, when it so intended, Congress specifically provided, as witness the provisions of Sections 201(c)

---

[17] Union Financial Statistics 1963-1966, U.S. Department of Labor, Labor Management Services Administration, February 1969, Tables 1 through 5.

[18] Union Financial Statistics 1960-1970, U.S. Department of Labor, Labor Management Services Administration, October 1972, Table 7, p. 26.

[19] *Hodgson* v. *Local 6799 United Steelworkers of America,* 403 U.S. 333, 338.

and 501(b). Congress struck the balance and opted for its general objectives aforesaid.[20] As expressed by an oft cited authority, as to Congress' intent and objective manifest by the Act, (it) "****clearly wished to create limits on the exercise of union authority without vitiating a labor organization's essential strength".[21] And depleting a local union's most limited treasury to pay an improper disciplined fellow member's counsel fee, would most seriously weaken, undermine and vitiate the local union's organizational and representative essential strength.

C. Courts of Appeals And Other Authorities Are in Conflict As To Section 102 Authority To Award Counsel Fees.

1. Opinions and decisions determining no authority to award counsel fees in successful Section 102 actions.

The Sixth Circuit in *McCraw* v. *United Association of Journeymen, etc.*, 341 F. 2d 705, 710 (1965), concurred with the District Court's holding that, in a successful Section 102 proceeding which established a violation of the member's Section 101(a)(2) rights, no authority is presented for the allowance of attorney fees for, "The Legislative history of this statute (Section 102) * * * reflects that the bill was so interpreted at the time of its enactment", citing Senator Goldwater's testimony before the House Com-

[20] It is to be noted that a disciplined member seeking reinstatement pursuant to Section 102, is not precluded from utilizing pendant jurisdiction to sue any individual, officer or person as well for a cause of action alleging such officer's or person's malevolent or abusive activities against him, resulting in loss of his membership and if successful, recover attorney fees reasonably incurred. cf. *Salzhandler* v. *Caputo*, 316 F. 2d 445, 451 (2 Cir.) cert. den. 373 U.S. 943.

[21] Prof. Thomas G. S. Christensen, NYU Law School; "Union Discipline Under Federal Law: Institutional Dilemmas in an Industrial Democracy." NYU Law Review, Vol. 43 No. 2, April 1968, 227, 278.

mittee *supra*, then having the Senate Bill (S 1555) before it for consideration. Thereafter the Sixth Circuit in *Sertic* v. *Cuyahoga, Lake etc., Carpenters District Council*, 459 F. 2d 579 [1972], involving *inter alia*, an issue of the amount of an attorney fee allowance from a fund of approximately half a million dollars created as a consequence of an increase in members' dues, found in a Section 102 action to be in violation of the Act's Section 101(a)(3), held, "This issue was not litigated in the District Court, and it can best be decided after findings of fact and conclusions of law have been entered there," *id.* 583. Nevertheless, the Circuit noted, that attorney fees are not mentioned in Section 102 and further noted that whether attorney fees may be allowed under the District Court's general powers, "* * * has produced answers which differ widely, depending upon the statutory language and the factual circumstances", citing to "generally", *Sprague* v. *Ticonic National Bank*, 307 U.S. 161, *Fleischmann, McCraw* and *Gartner, supra, id.* 583.

It is clear from the foregoing, that the Sixth Circuit has adhered to its *McCraw* holding, *supra*. It is equally most significant, that at bar we are not dealing with any "created common monetary fund" for attorney fees, or as in *Sprague, supra*, a "quasi created common monetary fund" affording a discernible class of persons to collect monies upon similar claims as a result of *Sprague's* success, see *Fleischmann, supra* at 719. Such extraordinary circumstances are not present at bar. Nor should Courts as done below at bar, utilize alleged court powers, to change the long established American rule relative to attorney fee awards, reiterated in *Fleischmann, supra*. And most paramount, not to change Congress' intent and legislation, *supra*.

In *Gartner supra*, a majority reversed the District Court's conclusion, that in a successful Section 102 action establishing violation of a member's Section 101(a)(2)

rights, attorney fees are not awardable. We discuss hereafter in detail the majority opinion. The *Gartner* minority however would have affirmed the District Court. The minority's decision is premised upon this Court's expression in *Fleischmann, supra,* that ordinarily counsel fees are not recoverable as damages. In support, the minority cited the legislative history *supra,* of the Congressional developments resulting in the enactment of the Act's Section 102. Commencing with the original Kennedy-Ervin bill in the Senate, and the amendment to such bill by Senator McClellan, it pointed out that in the McClellan amendment the sole authority to institute Section 102 proceedings was the Secretary of Labor. That the Kuchel amendment to the McClellan bill was adopted solely because of the concern that bureaucratic chaos might result if the Secretary of Labor was required to initiate all complaints. The minority concluded that the Secretary obviously would not be entitled to counsel fees and thus it would appear, that counsel fees were never intended by Congress to be authorized by Section 102's enforcement provision, to wit, "• • • such relief • • • as may be appropriate." Further in support of its conclusion the minority stated • • •, "indeed, all Congressional comment contained in the Legislative history is to the contrary", citing Senator Goldwater's remarks and the Minority House Report, *supra,* 384 F. 2d at 356-7.

In accord with the *Gartner* minority, is the minority in *Kerr* v. *Screen Extras Guild Inc.,* 466 F. 2d 1267 (9 Cir. 1972), mentioned *infra.* Numerous District Courts have also concluded that attorney fee awards are not authorized in successful Section 102 actions.[22]

---

[22] *Vars* v. *International Bro. of Boilermakers etc.* D. Conn. 1963, 215 F. Supp. 943, 952, aff'd. on a different issue, 2 Cir. 1963, 320 F. 2d 576; *Cole* v. *Hall,* E.D.N.Y. 1964, 35 FRD 4, 8, same case at bar prior to trial. However upon trial, the court advised that after consultation with brother Judge and his consent, Cole's claim for an

2. Opinions and decisions determining authority to award counsel fees in successful Section 102 actions.

The lead case, cited by other courts, which have concluded that Congress authorized attorney fee awards in Sections 102 and 609 proceedings is the Third Circuit's *Gartner* holding, *supra.*

The *Gartner* majority at the outset recognized that the only circuit court which had to then passed upon the instant issue of attorney fee awards in Section 102 proceedings, was the Sixth Circuit in *McCraw, supra.* With respect to the same the *Gartner* majority stated:

> "On appeal the Sixth Court affirmed the District Judge's finding" * * * that no provision is made for the allowance of attorney's fees in an action under Section 101 or 102 of the Act. * * *." *McCraw* v. *United Ass'n of Journey, & App. of Plumbing,* 341 F. 2d 705, 710 (6 Cir. 1965). *Id.* 350.

The Court majority rejected the remarks contained in the Minority House Report, *supra,* as well as those of Senator Goldwater, *supra,* noting that, neither of those communications were voiced as part of the floor debate on the Act in either the House or Senate, Id. 351, footnoting their (the court's) comments. The majority consequently characterized such report and remarks not appropriately legislative history to discern the Congressional intent. We respectfully submit that such conclusion is erroneous and constitutes an unfounded precept. Senator Goldwater's

---

attorneys fee award would be reinstated and determined. *Leonard* v. *M.I.T. Employees' Union,* D. Mass. 1964, 225 F. Supp. 937; *Magelseen* v. *Local Union* 518, Operative Plasterers, W.D. Mo. 1965, 240 F. Supp. 259; *Jacques* v. *Local 1418 International Longshoremen's Association,* E.D. La. 1965, 246 F. Supp. 857, 859; *Bailey* v. *Netter,* E.D. La., 1967, 266 F. Supp. 165 and *Yablonski* v. *United Mine Workers,* D.D.C. 1970, 314 F. Supp. 616, reversed on different issue, D.C. Cir. 1972, 459 F. 2d 1201.

statement (*supra* p. 13, 14) constitutes his testimony before the House Committee on Labor & Education after the Kuchel amendment *supra*, passed the Senate. Senator Goldwater was then explaining the Kuchel amendment to the House Committee. Senator Goldwater's testimony aforesaid was specifically found by this Court as the appropriate legislative history, *Hardeman, supra*, 401 U.S. at 244. An examination of the legislative history conclusively demonstrates that Senator Goldwater's aforesaid testimony was given on June 8th, 1959 at which time he made his above statements relative to Section 102 and relative to Section 101(a)(5), the later under review in *Hardeman, supra*. As to the Act's Section 102 the Senator's testimony is contained in 105 Cong. Rec. 9108 (daily ed.), II Leg. Hist. 1280, and as to Section 101(a)(5), the Senator's testimony is contained in 105 Cong. Rec. 9109 (daily ed.), II Leg. Hist. Contrary to the Third Circuit majority's conclusion, Senator Goldwater's testimony is the proper legislative history. It is unquestioned, this Court has so found, *Hardeman, supra*.

The Gartner majority then cited the comments of Congressmen Elliott and O'Hara.[23] Concluding, in accordance with *National Woodwork, supra*, "* * * primary concern should always be given to the views expressed by the sponsors of the bill and in this respect the statements of Senator McClellan and Rep. Elliott should be looked to as representing the true spirit of Section 102." Id. 353.

However, as the majority notes, the Elliott bill was rejected and the bill eventually passed by the House was the Landrum-Griffin bill. The majority's error is in its failure to observe its own rule, to wit, to look to the

[23] The majority's citation of Representative O'Hara's comments at p. 353, failed to state that such were made in support of the rejected Elliott bill, 105 Cong. Rec. 14357 [daily ed.]; II Leg. Hist. 1633, and made at a time that the Landrum-Griffin bill was before the House; See Rep. Griffin statements, 105 Cong. Rec. 13088, 13091 [daily ed.]; II Leg. Hist. 1519, 1522. Id. 352, 353.

comments of the sponsors of the Landrum-Griffin bill as representing the true spirit of Section 102. For as we have demonstrated, *supra*, Representative Griffin's views furnish no basis to conclude that there is Congressional authority for award of attorney fees. On the contrary, the conduct sought remedied was comparable to Taft-Hartley unfair labor practices and consequently intent for comparable remedies. Similarly, as to the statements of Senator McClellan as representing the true spirit of Section 102. As the *Gartner* minority *supra* expressed, in accord with the majority, and as our discussion of Senator McClellan's amendment equally express, the Senator's amendment constituted no rational basis to conclude that attorney fees were authorized. On the contrary, it's relief provisions, limited to their exercise by the Secretary of Labor, compels the conclusion that attorney fees were never intended or authorized. To conclude otherwise, would mandate that Congress authorized the courts to award attorney fees to the Secretary of Labor, a result most far fetched, if not inconceivable. Similarly, the majority's reliance upon *Johnson* v. *Nelson*, 325 F. 2d 648 (8th Cir. 1963), is inappropriate. *Johnson* was a proceeding pursuant to the Act's Section 501(a) and (b) where Congress expressly authorized the award of counsel fees. The *Johnson* court's comments as to Section 102, not relative or necessary to their determination, sans exhaustive study, review and analysis of the legislative history, and made prior to the *Fleischmann* holding, *supra*, is at the best purely gratuitous dicta.

The *Gartner* majority, apparently in an endeavor to explain away Congress' failure to expressly provide authority for attorney fee awards, held that it was because of:

> "• • • in the heavy pressure atmosphere attending the creation of the Labor Management bill of rights legislation there was a manifest reluctance to specifically detail the individual's right to reimbursement

> for counsel fees expended in defeating his union's effort to deprive him of his fundamental rights as a member. Nevertheless, the Congress was successful in protecting that right by giving such union member "appropriate relief". That phrase, while it avoided spotlighting the making available of necessary material assistance to a single unionist fighting his lonely battle for justice, did take care of the situation by means of the deliberately general language used. In the clear light of the latter, if the Congress had concluded to reverse its field and tear up the bill of rights it had drafted, it would have stated that there would be no counsel fees allowed. Absent this, "appropriate relief" fairly construed must be held to include proper counsel fees." Id. 355.

It is most respectfully submitted that the foregoing does not demonstrate a search for legislative intent. It is, we respectfully submit, an interpretation premised upon conjecture, not a judicial search for the requisite intent of Congress. The court's opinion first creates a "heavy pressure atmosphere" without explication upon such phrase. It then attributes to Congress "a manifest reluctance to specifically detail an individual's right to reimbursement for counsel fees * * *." If further attributes to Congress the utilization of the term "appropriate relief", as the authority for attorney fee awards, in order to "avoid spotlighting". Why such heavy pressure atmosphere, reluctance and spotlight avoidance did not preclude Congress from expressly authorizing attorney fee awards in other Sections as demonstrated *supra*, is never explained. Most significant is Section 609. It provides that Section 102's enforcement provisions shall be applicable to it in enforcement proceedings to remedy a violation of a member's right under any provisions of the Act. It is not limited to the bill of rights legislation. Yet, by the court's holding, premised upon "heavy pressure atmosphere", attorney fee awards by virtue of Section 609 are applicable to remedying all rights, not solely those set forth in the bill of rights, concerning which, the court concludes such, "heavy pressure atmosphere" was only applicable.

We again most respectfully submit, that the acceptance of such criteria, the utilization of such nebulous, ephemeral and subjective standards for judicially determining Congressional intent, would render the task impossible of objective performance. It would be contrary to the criteria and long established doctrine set forth in *Fleischmann, supra.* Such conduct, if authorized, would judicially usurp functions of Congress.

In addition to the Third Circuit's holding in *Gartner,* the Fifth Circuit has also passed upon the same issue. In *Burch* v. *International Assn. of Machinists,* 454, F. 2d 1170 (1972), the Fifth Circuit, in a per curiam decision held:

> "The judgment of the district court, 337 F. Supp. 303 is affirmed. See Local Rule 21. That court's finding that the termination of Burch's membership was arbitrary and discriminatory is not clearly erroneous. Moreover, the district court properly construed the "appropriate relief" provision of the Landrum-Griffin Act to permit the award of attorney's fees in this case. 29 U.S.C. § 412; *Gartner* v. *Soloner,* 3 Cir. 1967, 384 F. 2d 348, cert. den'd 390 U.S. 1040, 88 S.Ct. 1633, 20 L. Ed. 2d 302."

The Ninth Circuit majority in *Kerr supra,* in reliance upon the Gartner majority rational, is in accord with Gartner.

The Second Circuit in the case at bar, affirmed in part upon the *Gartner* authority, *supra,*[24] perpetuating the conflict among and between the courts. As to the application of the *Fleischmann* holding, and the fact that Congress expressly authorized attorney fee awards in some Sections

[24] The Court concluded that the Sixth Circuit's *McCraw* holding is not contrary to *Gartner,* although oft so cited, as an examination of that case "reflects that the court * * * did not specifically pass on Section 102, but instead considered Section 431(c)" Id. 780. We respectfully submit that the court is in error. *Gartner, supra,* expressly states otherwise, so does a close reading of *McCraw* as well as the Sixth Circuit's reaffirmation in *Sertic, supra.*

of the Act and not others, the court characterized it as a "non sequitur here", stating:

> "These sections have to do with narrowly defined remedies such as the examination of books and records and an accounting. Here the relief necessary cannot be as easily foreseen nor broadly specified which accounts for the unlimited language of the Congress in § 102 i.e. 'such relief as may be appropriate'." 462 F. 2d at 781.

Section 401(c) equally has to do with narrowly defined remedies such as the right to inspect membership lists and for campaign literature to be mailed at a member's expense. Yet Congress did not provide for attorney fee awards there as they did for remedies under Section 201(c) and 501(b). No explanation is proferred by the Second Circuit of Congress' different remedy treatment for these same narrowly defined remedies.

Interpreting the Act in the manner performed by the Second Circuit, *supra*,[25] is contrary to the Act's legislative history and to the historic doctrine in the United States relative to award of counsel fees in statutory causes of action, expressed in *Fleischmann, supra.*

---

[25] The Court notes that plaintiff's counsel was "largely on a pro bono publico basis". Id. 780. The record demonstrates the finding that counsel was assigned *Civil Liberties Union* counsel whose services were gratis (A. 2). As to the Court's comments that Cole's preliminary injunctive relief required six months, "largely because of the dilatory action of the union and its officers", Id. 780—there is no support in the record, let alone evidence to justify such statements. Significantly and most unusual, the Court fails to discuss, take notice or even mention the trial court's findings, *supra*, that the union and its officers acted in good faith, without malice and the court's failure to find that Cole's conduct was in good faith, but on the contrary, found his conduct motivated in part by political ambitions for office. As to the Court's observation of "* * * unions' propensity to deprive members of their rights of free speech", the Congressional conclusion is otherwise, see Sen. Rep. *supra* fn. 4, *Hodgson supra* at 338, fn. 19 *supra*.

Various District Courts have followed or are in accord with the *Gartner* majority holding.[26]

D. The *Fleischmann* and *Mills* Holdings.

Fleischmann supra, reaffirmed the rule in effect in American Courts since 1796,[27] "* * * that attorney fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor." *The Gartner* majority and their progeny although apparently observing allegiance to such rule, nevertheless bring about a result, the effect of which would abridge the aforesaid rule. For by undertaking the task of interpreting the statute and in the endeavor resorting to the utilization of subjective tests of Congressional "heavy pressure atmosphere", never explicated upon, and attributing to Congress a "manifest reluctance" to state what it authorized in order to, and again subjectively "avoid spotlighting", the result is that the above most historical rule is changed not by Congress but by the courts, so as to allow recovery of attorney fees in a statutory cause of action, notwithstanding no Congressional provision for the same. Such we respectfully submit is error.

Fleischmann made clear that although Judge exceptions have been made to the rule over the years, such exceptions have been confined to non statutory actions, "when overriding considerations of justice seemed to compel a result", *id.* 718, or in a civil contempt proceeding for "wilfull disobedience of a court order", *id.* 718. Further ex-

---

[26] *Sands* v. *Abelli* S.D.N.Y., 1968, 290 F. Supp. 677; *Local 2 International Bro. of Telephone Workers* v. *International Bro. of Telephone Workers,* C.D. Mass. 1969, 295 F. Supp. 1178, 1180, aff'd. on a different issue, 1st Cir. 1969, 461 F. 2d 414; *White* v. *King* E.D. La., 1970, 319 F. Supp. 122; *Cefalo* v. *International Union of District 50, United Mine Workers of America,* 1970, 311 F. Supp. 946, 955; *Robins* v. *Schonfeld,* S.D.N.Y. 1971, 326 F. Supp. 525, 531.

[27] *Arcambel* v. *Wiseman,* 311 Dall. 306, 1 L.Ed 613, *Fleischmann* at 717, 718.

ception has been made, "where a plaintiff traced or created a common fund for the benefit of others as well as himself", *id.* 719. Or in a situation similar to the common fund, where by plaintiff's action, "the *stare decisis* effect of the judgment obtained by the plaintiff established as a matter of law, the right of a discernible class of persons to collect upon similar claims", *id.* 719—the monetary common fund concept again. In *Fleischmann,* this Court citing the aforesaid American rule, specifically rejected court authority to award attorney fees in a statutory action, leaving to the plaintiff the remedy Congress provided and no more—a situation comparable and analagous to the issue at bar involving comprehensive and complex statutes with enumerated remedies, as to which the *Fleischmann* court concluded, "marked the boundaries of the power to award monetary relief", *id.* 721.

We respectfully submit that this Court's holding in *Mills, supra,* does not alter the *Fleischmann* holding. In fact it is wholly consistent therewith and most significantly is not authority for attorney fee awards in Section 102 proceedings.

Mills, involved stockholders action against the managers of their corporation relative to a material misleading proxy statement for voting on a corporate merger, predicating jurisdiction on Section 27 of the Securities Exchange Act, 15 U.S.C. Section 78aa, alleging violation of that Act's Section 14(a) and S.E.C. rules. This Court pointed out that:

> "The Act makes no provision for private recovery for a violation of § 14(a) other than the declaration of 'voidness' in § 29(b), leaving the courts with the task, faced by this Court in *Borak,* of deciding whether a private right of action should be implied. The courts must specifically determine whether the special circumstances exist that would justify an award of attorneys' fees, including reasonable expenses of litigation other than statutory costs" *id.* 391.

The *Mills* court following precedent, "implied" a private right of action.[28] It is not a private right which Congress expressly provided. Present in the case at bar however, is a private right created by statute (Section 102), a situation most clearly different and distinguishable from *Mills*. The issue at bar is analagous and comparable to the issue in *Fleischmann*. Furthermore, the implied right in *Mills* is akin to the Act's Section 501(b) provisions, *supra*. Both actions are of a derivative nature, however Congress in Section 501(b) expressly provided the right and the remedy including judicial authority to award counsel fees—such was not done however with respect to Section 102. Of course, significant is that a union is not a private money making business. It's profit is its economic and social gains of its members—its institutional interests are wholly dissimilar from a corporation and have been long so recognized by the nature of Congressional and judicial treatment, *Vaca*, *Morton* and *Linn*, *supra*.

We reiterate, the *Mills* holding should not be utilized to emasculate the long standing American rule enunciated in *Fleischmann*. If such rule is to be changed, it is solely the Congressional function.

E. Conclusion.

This case has presented fundamental issues relative to objective standards to be utilized for the interpretation of Congress' legislative history and its intendment. The lower courts are in conflict as to such legislative history, its meaning and effect. We submit that based on objective criteria employed in the search for an evaluation of the legislative history, as well as Section 102's provisions, courts are not empowered to award counsel fees in actions brought pursuant to such Section. Furthermore, the historic nature

[28] *Yablonski* v. *United Mine Workers*, 314 F. Supp. 616, *supra*, reversed on a different issue fn. 22 *supra*, at 618-620, where the District Court points out that the *Mills* holding constitutes an implied private right as distinguished from Section 102, which is a statutory created private right, as in *Fleischmann*.

of unions and their constituency, facts most familiar to Congress, dispels the drawing of any conclusion that Congress authorized attorney fee awards in actions such as at bar. To the contrary, when Congress authorized such awards against unions they so expressly provided. The decisions of this Court as to the long established American rule applicable to the award of attorney fees as discussed above, should not be changed by the courts—such is solely the legislative function. Nor should this Court's *Mills* decision, implementing created implied private rights, be permitted to become applicable to express statutory created rights, as such would similarly usurp Congress' prerogative to effect the change. Finally, the award of counsel fees in Section 102 actions would have most serious adverse effects upon union self government and upon the ability of a union to act as a meaningful bargaining representative, results contrary to Congressional objectives.

II.

Counsel fees are not awardable in suits against unions under Section 102 for violation of members Section 101 (a) rights where the union acts in good faith or without malice. Nor are such fees awardable unless the suing member is found to have acted in good faith.

Assuming arguendo that Section 102 authorizes District Courts to award counsel fees, there then remains for determination, under what facts and circumstances are such awards proper? As to such latter determination, there is a conflict among the Courts of Appeals.

A. *Legislative And Judicial Concern In Fashioning Monetary Awards Against Unions.*

This Court has demonstrated its and Congress' concern, in a variety of contexts, as to the type and nature

of monetary awards which may be levied against unions. Consistent therewith, this Court has demonstrated that such awards be drawn with great caution.

In *Linn, supra,* this Court, in recognition of the need for stability of labor unions and effective administration of national labor policy, 383 U.S. at 64, postulated the limits of state remedies in common law libel actions against unions. Recovery of damages was limited to, * * * "defamatory statements **circulated with malice and caused (plaintiff) damages", id 65; to "* * * defamatory statements published with knowledge of their falsity or with reckless disregard of whether they were true or false * * *"; id 65; no recovery "except upon proof of (resulting) harm, id 65; with no punitive damages except upon establishing the sufferance of compensable harm, id 66; and "If the amount of damages awarded is excessive, it is the duty of the trial judge to require a remittitur or a new trial", id 65, 66. In result, *Linn* dictates that inter alia, in the interest of national labor policy, monetary awards are not proper against unions absent the finding of their malicious conduct.

In *Vaca supra,* this Court inter alia, was faced with determining under what circumstances monetary damages may be recovered against a union by a member claiming a breach of the union's duty of fair representation, to wit, its failure to process the member's grievance relative to his reemployment after illness, pursuant to collective bargaining agreement provisions in effect between the union and the employer. Reversing the member's monetary damage judgment against the union, it was held that a breach of the aforesaid duty occurs, "* * * only when a union's conduct * * is arbitrary, discriminatory, or in bad faith", 386 U.S. at 190. And the fact that the member may have convinced the trial jury, that he was recovered from his illness and in fact fit to return to work, the same was found insufficient to sustain the damage award, id. 193. The test to establish his claim and secure monetary

damages against the union, as stated by this Court, was, "he must also have proved arbitrary or bad faith conduct on the part of the union in processing his grievance", id. 193. Most recently this Court reiterated the aforesaid test in *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, etc.* v. *Lockridge,* 403 U.S. 274, that there must be proved, "arbitrary or bad—faith conduct on the part of the union", citing *Vaca,* id. 290. "There must be 'substantial evidence of fraud, deceitful action or dishonest conduct' ", citing *Humphrey* v. *Moore* 375 U.S. 335, id, 290.

The totality of the foregoing we submit, is that in instances where the member's fundamental employment is involved, his economic welfare is at stake such as in *Vaca,* jeopardizing probably accrued pension and other beneficial fund rights,[29] nevertheless the union treasury is not to be levied upon, without the trial court first making the requisite finding of arbitrariness, bad faith, or substantial evidence of fraud, deceitful action or dishonest conduct by the union. Certainly no less standards should be applied for union disciplinary proceedings, particularly in light of Congress' general objectives manifest in the Act, that, "A strong independent labor movement is a vital part of American institutions", and that care must be utilized "* * * neither to undermine self-government within the labor movement nor to weaken unions in their role as the bargaining representatives of employees", *Hodgson* supra, 403 U.S. at 338, *Allis* v. *Chalmers* supra, 388 U.S. at 195.

---

[29] It is to be noted that a member disciplined by a union and expelled or suspended from membership, may not lawfully be terminated from or interfered with his employment rights. Such conduct constitutes union unfair labor practices under the Taft-Hartley Act *supra,* Sections 8(b)(1) and (2); also employer unfair labor practices under Section 8(a)(3) of such Act, which may appropriately be remedied under that Act's Section 10(c). It is to be further noted that at bar, as found by the Trial Court, Cole subsequent to his discipline and expulsion retained all employment rights and benefits.

Equally significant why the foregoing *Linn, Vaca, Humphrey* and *Lockridge* tests should be utilized at bar, are the historical facts relative to the functioning of labor unions set forth above [30] and the Act's statutory requirement for unions to adopt a constitution and by laws and their contained self enacted provisions for member disciplinary proceedings.[31] In administering disciplinary proceedings under a union constitution in a reasonable manner,[32] the union tribunal generally consists of its members, workers and lay persons and acts as a quasi judicial body. Manifestly the union should not be liable for damages, let alone counsel fees, for the tribunal's lack of expertise, errors or mistakes, absent proven substantial evidence of fraud, deceitful action or dishonest conduct—arbitrariness, bad faith. Our judicial tribunals with their trained and highly qualified judges, expertise, staff and facilities are not so subject.

Congress through the Act was directing its regulation against unions use of arbitrary powers as witness this Court's observation in *Allis-Chalmers,* 388 U.S. at 195. "The kind of regulation of internal affairs which Senator Taft said protected stockholders of a corporation and made necessary a 'right of protest against arbitrary powers which have been exercised by some of the labor union leaders', is embodied in the 1959 Act." And we submit, it is such conduct alone which was to be redressed.

Further evidence of Congress' concern in fashioning monetary damage awards against unions, in the interest of national labor policy, is manifest in the Taft-Hartley Act. In *Local 20 Teamsters, Chauffeurs and Helpers*

---

[30] See also, *Allis-Chalmers, supra,* 388 U.S. at 181. "Integral to this federal labor policy has been the power in the chosen union to protect against erosion its status under that policy through reasonable discipline of members who violate rules and regulations governing membership.[7] Fn. citing authorities.

[31] Section 201(a)(5) (I) *supra.*

[32] *Hardeman supra,* 401 U.S. at 246.

Union, etc. v. *Morton*, 377 U.S. 252, 260, this Court pointed out Congress' intent, that for statutory secondary boycott activities, that Act's Section 303, monetary judgment awards against unions are limited to actual compensatory damages. This Court referred to Senator Taft's statement, that, "Under the Sherman Act the same question of boycott damages is subject to a suit for damages and attorney's fees. In this case, we simply provide for the amount of actual damages" id. 260 fn. 16.

And what about the responsibilities and duties of a member? We submit, as more fully discussed hereafter, a member has the obligation to conduct himself consistent with the reasonable interests of his fellow members and reasonable interests and rules of the union as an institution, so that it may discharge its responsibilities as perceived and reflected in national labor policy. Congress expressly so intended.[33] Surely a fundamental requirement, a most reasonable rule is that a member act in good faith. The Act's Title I provisions were intended as a shield against arbitrary action, *Allis-Chalmers*, 388 U.S. at 195 *supra*. Such Act should not be used by a member as a sword. We submit that no disciplined member, successful in a Section 102 action against his union, should be awarded counsel fees, assuming *arguendo* Section 102 authority, unless it is found that his conduct and the pursuit of his Title I rights and remedies were in good faith.[34]

B. The Standards Applied by Courts of Appeals In Determining When Counsel Fee Awards Are Proper, Are In Conflict.

The question as to whether counsel fees are awardable in a successful Section 102 action, where there is no finding that the member acted in good faith, or where there is no

---

[33] Section's 101(a)(2) proviso *supra* "* * * reasonable rules as to the responsibility of every member toward the organization as an institution * * *".

[34] As shown (A. 2), Cole incurred no costs for counsel fees. Cole's counsel was "* * * assigned by the Civil Liberties Union" * * * (and) the services of counsel are rendered gratis * * *".

finding that a union acted in bad faith or with malice, or where there is a finding that the union acted in good faith or without malice, has been before numerous Courts of Appeals and has resulted in apparent different conclusions.

As to the requirement of the successful member's good faith, the Third Circuit in *Gartner* supra, has determined that such member or members may be awarded counsel fees if they "* * * have in good faith pursued their rights under Title I of the Act", 384 F 2d, at 356. Both the Fifth Circuit in *Burch* supra, 454 F 2d, at 1171, and the Ninth Circuit in *Kerr* supra, 466 F 2d, at 1270, concurred with the Third Circuit's conclusion, that counsel fee awards are authorized in Section 102 actions. However, neither the Fifth or Ninth Circuits address any comments as to the condition required by *Gartner*, to wit, the finding of the member's good faith. We may only conjecture.

As to the Second Circuit at bar, although they rely upon the Third Circuit's *Gartner* holding, that counsel fee awards may be proper in Section 102 actions, they are not however, in complete accord with *Gartner*. For as noted, *Gartner* requires the condition that the member must have acted in good faith, whereas at bar before the Second Circuit, the Trial Court did not find Cole's good faith, but on the contrary, concluded that Cole was, "in part, motivated by * * * political ambitions for union office", (A. 2-C. 38, ¶ 34). Nevertheless, the District Court awarded counsel fees to Cole and the Second Circuit affirmed.

We respectfully submit that Congress manifested that Title I was intended to remedy abusive powers[35] and not to have union treasuries subject to monetary awards including counsel fees, for members who have not established their good faith. Surely, fellow members' treasury assets should not be used to pay Cole's counsel fees to subsidize his ambitions for political office.

---

[35] *Allis-Chalmers* 388 U.S., at 195 *supra*.

As to the issue of a union's bad faith or malice requirements, the aforesaid *Vaca, Linn, Humphrey* and *Lockridge* holdings, none of the Circuits above, other than the Fifth in *Burch* supra, have required such finding against the union as a condition for the award of counsel fees. In *Burch* the Fifth Circuit, per curiam, affirmed the District Court's award on a finding that the union's action was "arbitrary and discriminatory", 454 F2d at 1171.

At bar, notwithstanding the District Court's findings that all defendants acted in good faith, believed they had a right to charge and discipline Cole and that there was an absence of showing of malice by any of the defendants (A. 3-C. 19a; A. 2-C. 38a), nevertheless, counsel fees were awarded and the Second Circuit affirmed.

We reiterate, assuming arguendo Section 102 authority, counsel fee awards are only proper upon a finding of the union member's good faith as set forth above, together with a finding of the union's bad faith or malice and that all of such findings must be based upon substantial evidence in the record. The above described legislative history, trade union status structure history and this Court's decisions, supra, mandate such standards.

Conclusion

The American rule is that attorney fees are ordinarily not recoverable in the absence of a statutory or contractual provision allowing thereof. Congress' enacted Section 102 does not contain any authority for the award of attorney fees. The Act's legislative history, taken together with the history of trade union structure status known to Congress, together with this Court's decisions elucidating Congress' general objectives of the Act, and its concern for monetary awards against unions contrary to national labor policy, all direct that Congress did not authorize the award of counsel fees in successful Section 102 actions. Such Sec-

tion constitutes Congress' statutory conclusion, and Judge made exceptions to award counsel fees in such actions is not authorized, as such conduct contravenes the aforesaid American rule. The change of said rule is solely a Congressional function.

Assuming arguendo, counsel fee awards are authorized by Section 102, the same are not proper unless there are findings, based upon substantial evidence in the record, that the suing member pursued his Title I rights and remedies in good faith and that the union acted arbitrary, with malice, in bad faith.

The District Court's judgment below and its affirmance by the Court of Appeals, awarding counsel fees, should be reversed and remanded with direction to vacate the counsel fee award.

Respectfully submitted,

HOWARD SCHULMAN
Attorney for Petitioners
1250 Broadway
New York, New York 10001

Of Counsel:

SCHULMAN, ABARBANEL & SCHLESINGER
New York, New York 10001